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NOTES

HIV-INFECTED HAITIAN REFUGEES: AN ARGUMENT AGAINST EXCLUSION

ELIZABETH MARY MCCORMICK*

I. INTRODUCTION

In the wake of a presidential race during which the three major candidates focused their attentions and efforts on domestic rather than foreign policy issues—in particular, the economy and health care—the new Administration has been faced almost immediately with the challenges created by world events which have put entire nations on the move to escape war, oppression, famine, and poverty and which, in many ways, represent real or perceived threats to these United States domestic interests. Following his election November 3, numerous press reports predicted how then- President-elect Bill Clinton would respond to the challenges of his first 100 days in office. Among those issues expected to be priorities for action by Clinton were gays in the military, abortion, exclusion of aliens infected with the Human Immunodeficiency Virus (HIV), and the interception of Haitian refugees by the United States Coast Guard.¹ All four issues were the subject of great controversy during the Ronald Reagan and George Bush Administrations and Clinton's actions were expected to modify greatly, if not completely reverse, the policies of his predecessors in these areas.²

Indeed, within one week of his inauguration, President Clinton had taken action to lift the ban on homosexuals in the military³ and to con-

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1. David G. Savage, *Policy Switch Easy As Stroke of Clinton Pen*, L.A. TIMES, Nov. 7, 1992, at A1.

2. *Id.*; see also CNN News: *Clinton contemplates Plans for Presidency* (CNN television broadcast, Nov. 7, 1992).

3. Ruth Marcus and Helen Dewar, *Pact on Gay Ban Remains Elusive*, WASH. POST, Jan. 29, 1993, at A1.

tinue to enforce, at least temporarily, the Bush Administration's policy of returning Haitian refugees to their country without political asylum hearings.⁴ In addition, Clinton aides suggest that the President is poised to put into effect executive orders which would overturn bans on the discussion of abortion in federally funded family planning clinics and the admission into the United States of aliens infected with HIV.⁵ President Clinton has acted swiftly, if not always predictably, in making these first crucial decisions of his Administration, and the message his actions have sent so far, regarding Haitian refugees and HIV-infected aliens in particular, will have special implications for 222 Haitian refugees who are currently being held at a U.S. Naval Station at Guantánamo Bay, Cuba, and who have tested positive for HIV, the virus which causes AIDS.

Intercepted at sea by the U.S. Coast Guard, these Haitians were brought to Guantánamo to be interviewed by Immigration and Naturalization Service officials to determine their eligibility to come to the United States to apply for political asylum. Then, having overcome what is for most refugees the only hurdle to entrance into the United States, they have been faced with a second, and for the moment, insurmountable obstacle in their search for safe haven. Their uncertain fate implicates economic, racial and public health issues which are of concern to many Americans and which, as a result, will yield no easy solutions. Therefore, in formulating its response to this crisis, the new Administration will undoubtedly consider the message its actions will send to those who may perceive that response as directly implicating them: minority groups; families unable to afford health care; the unemployed or underemployed; and people living with HIV or AIDS in the United States. Moreover, President Clinton cannot ignore the message he sends to the international community regarding the United States' willingness to accept refugees generally and those with the HIV infection in particular. He must be careful to acknowledge that the HIV and refugee crises are international crises from which the United States cannot effectively protect itself through a policy of blanket exclusion. Rather, the United States must acknowledge its role in an international endeavor to combat AIDS and provide humanitarian relief to refugees.⁶

4. Michael Duffy, *Ready or Not: As Clinton Takes Office, A Slow Start and A String of Broken Promises Signal A Rough Ride Ahead*, TIME, Jan. 25, 1993, at 28. In response to criticism for his apparent reversal on a policy which he had earlier condemned as "callous," Clinton said, "I still believe the policy should be changed . . . but I don't think we can do it on a dime on January 20th." *Id.*

5. George J. Church, *His Seven Most Urgent Decisions*, TIME, Jan. 25, 1993, at 33.

6. See *The Foreign Policy Challenge; Setting the Agenda*, BOSTON GLOBE, Oct. 9, 1992, at 22. "The next president will have to grasp the connection between these supernatural scourges and America's national security. He will have to explain that connection to the American people. And he will have to secure their backing for U.S. participation in international efforts to confront dangers common to people around the world." *Id.*

The purpose of this Note is to argue that exclusion of aliens infected with HIV, in particular those aliens seeking to enter the United States as political refugees, is a policy which exacerbates an already critical world health problem by perpetuating misconceptions about where the virus originated and how it is transmitted. Moreover, such exclusionary policies ignore the fundamental premise of United States refugee law by failing to consider the compelling circumstances which prompt certain aliens to leave their homes and seek refuge in the United States. Finally, exclusion does not further legitimate economic or public health interest on the part of the United States.

The exclusion of HIV-infected Haitian refugees flows from the once firmly held perceptions that Haiti is the birthplace and primary source of the HIV virus and that most Haitian refugees are fleeing economic hardship rather than political persecution. Through a discussion of the origin of the Haiti-AIDS link and the subsequent discovery of the earliest reported AIDS cases outside of Haiti, the fallacy of the notion that AIDS comes from Haiti and Haitians will be revealed. Moreover, a pattern of discrimination stemming from that fallacy, including the designation of Haitians and visitors to Haiti as a group at high-risk for contracting and spreading the AIDS virus, will be exposed as inherently misguided in light of current knowledge that behavior, not nationality, puts individuals at risk.

The exclusion of all HIV-infected aliens—tourists, immigrants and refugees, alike—has been a source of controversy within the Administration and the Congress since 1987.⁷ The debate has been particularly acute since 1990, when the most recent amendments to the Immigration and Nationality Act (INA) were put in place.⁸ Responding to pressure from a number of sources, President Bush ignored the recommendations of his own health care officials to remove HIV-infection from a list of health-related grounds for exclusion of aliens. An analysis of the background and purpose of the medical grounds for exclusion of aliens under the INA, in particular the most recent recommendations by the Department of Health and Human Services that HIV and other sexually transmitted diseases be eliminated from that list, will reveal that the purported public health reasons for denying admission to aliens infected with HIV have their basis in fear and ignorance about the virus and those who carry it, rather than in sound medical research. In addition, concern that aliens infected with HIV will burden American taxpayers with their medical expenses would appear to be an insuffi-

7. The Senate voted in 1987 to support a bill which would bar all aliens infected with the AIDS virus from entering the United States. See *Visas and Virus*, WASH. POST, April 9, 1990, at A18.

8. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

cient and discriminatory basis for exclusion in light of the fact that aliens with other costly illnesses like cancer, diabetes and heart disease are not prohibited from entering.⁹ Indeed, if health care costs are the concern, the INA¹⁰ permits exclusion of aliens based on an inability to meet their anticipated expenses regardless of their nature, so the economic rationale for the HIV exclusion must also fail.

Finally, turning to provisions within the INA regulating the admission of refugees, it becomes clear that Congress did not intend the grounds for exclusion applicable to other aliens to apply to aliens seeking political asylum in the United States. Rather, Congress provided for outright exemption from certain exclusionary grounds and for discretionary waivers of others, including health-related grounds, for political refugees.¹¹ Nevertheless, the Attorney General has not exercised that discretion in dealing with the Haitian asylum applicants at Guantánamo, despite the fact that the wisdom of the exclusion policy affecting HIV-infected aliens has been roundly criticized. This decision suggests that a certain cynicism about Haitians, as largely economic migrants and purveyors of the HIV virus, still pervades this Administration's policy choices. A discussion of the events and policy decisions leading up to the indefinite detention and isolation of these Haitians at Guantánamo reveals the motives of an Administration hesitant to welcome thousands of Haitians fleeing persecution at home, and willing to dignify the misguided fears and perceptions about the Haiti-AIDS link in order to exclude as many of those Haitians as possible.

Since the coup that ousted President Jean Bertrand Aristide on September 30, 1991, the United States policy regarding the thousands of Haitians who have fled Haiti has been the subject of ongoing litigation. Of particular interest here is a complaint filed by legal services providers in the U.S. seeking access to Haitians detained at Guantánamo.¹² This complaint arose out of the Bush Administration's decision last February to process the asylum applications and conduct the asylum hearings for those Haitians infected with HIV at Guantánamo rather than in the United States. The Administration's decision was particularly controversial because in doing so, it refused to allow these Haitians access to counsel. Consequently, the likelihood of their being granted a favorable ruling in an asylum hearing was undoubtedly diminished.

Whether these Haitians find relief through the courts or through Executive intervention, the continued failure to focus on the validity of their claims for asylum rather than their HIV status seems to undercut

9. 138 CONG. REC. S9967 (daily ed. July 20, 1992)(statement of Sen. Simon).

10. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4)(1988).

11. INA § 207(c)(3), 8 U.S.C. § 1157(c)(3) (1988).

12. Haitian Centers Council, Inc. v. McNary, 789 F. Supp. 541 (E.D.N.Y. 1992).

the humanitarian purposes of U.S. refugee policy, as well as the public health interests the exclusion policy seeks to protect. Congress clearly intended, through the asylum provisions of the INA, to remove substantial barriers to the admission of refugees wherever possible. However, in the case of these 222 Haitians, the Administration seems intent on maintaining this supposed barrier against the HIV virus. Unfortunately, the barrier protects no one in the United States from the spread of HIV, while it denies these Haitians their right to seek protection from political persecution.

II. IS HAITI A NATION AT RISK?

A. *The Centers for Disease Control Identify Haitians As a High-Risk Group*

The connection between Haiti and AIDS originated in the United States in 1982. At that time, the Centers for Disease Control (CDC) identified Haitians as one of four groups at high-risk for contracting and transmitting AIDS.¹³ The other three groups were homosexuals, intravenous drug-users and hemophiliacs.¹⁴ Federal health investigators based this determination on the fact that five percent of the total number of AIDS cases reported in the United States at that time were Haitians, living in the United States, who did not appear to fit into any of the other known high-risk groups.¹⁵

Unlike the other high-risk groups, Haitians were not identified because of any specific behavior they engaged in which might make transmission likely. Rather, because health officials had been unable to determine how the virus had been contracted by this group of Haitian-Americans, the CDC had, with some hesitation, concluded that their national origin somehow placed them at risk.¹⁶ However, CDC epidemiologist Dr. Harold Jaffe admitted that it had been difficult to obtain information about personal habits from many of the Haitian AIDS patients, information which might have placed them in one of the other behavior-related high-risk groups.¹⁷ "Homosexuality and certain ill-

13. John Wilke, *Physician Disputes Link Of Haitians, AIDS Risk*, WASH. POST, Aug. 2, 1983, at A2.

14. *Id.*

15. *Id.* By July 26, 1983, 1,922 cases of AIDS had been reported to the CDC, the majority of which were among male homosexuals and intravenous drug abusers. *Id.* From 1981 through December 1987, the number of reported cases increased to 50,000, and by August 1989, 100,000 AIDS cases had been reported in the United States. *The Second 100,000 Cases of Acquired Immunodeficiency Syndrome — United States, June 1981-December 1991*, 41 MORBIDITY AND MORTALITY WKLY. REP. 28, 28 (1992). By December 31, 1991, a cumulative total of 206,392 AIDS cases had been reported in the United States, with an estimated 1 million more people, asymptomatic for AIDS-related illnesses, infected with HIV. *Id.* at 28-29.

16. Wilke, *supra* note 13, at A2.

17. *Id.*

nesses are not freely discussed in Haiti," he said.¹⁸ Consequently, because "sociocultural differences [could] lead to problems in obtaining sensitive personal information from Haitians living in the United States," federal health officials warned from the beginning that "identification of Haitians as a risk group must be interpreted cautiously."¹⁹

Despite these disclaimers by the CDC, many Haitians and Haitian-Americans objected to this association of the Haitian population with AIDS. They felt that the classification was unfair and premature in light of the evidence which supported it.²⁰ Other factors, including language barriers, put the CDC findings in serious doubt. "Most of the data used by the CDC and other health authorities were gathered by hospital-based physicians with no knowledge of French or Creole who have admitted their complete ignorance of the intricacies of the Haitian culture."²¹

This lack of real understanding of how AIDS was transmitted among the population in general and among the Haitian population in particular, contributed to an atmosphere of fear surrounding Haiti and the Haitian people. Tourism, Haiti's primary industry, declined by seventy-five percent in 1983, a drop attributed by many to the purported Haiti-AIDS link.²² This loss of income was significant in a country with the lowest per capita income in the Western Hemisphere.²³ According to then-Haitian Ambassador Fritz N. Cineas, this misunderstanding about the transmission of AIDS by Haitians "created a pall of gloom over the country, deterring potential business investors and tourists."²⁴

B. *AIDS Risk Defined by Behavior, Not Nationality*

As investigation into the nature of the disease and its means of transmission progressed, it became apparent that behavior, not nationality, was the explanation for the high incidence of AIDS among Haitians. The discovery in 1983 that AIDS was spread disproportionately in a community in Haiti where homosexual prostitution was common suggested that the distribution of the disease there was consistent with its spread in other populations.²⁵ This proof of homosexual contact in some

18. *Id.*

19. John Wilke, *Haitian Says Economy Hurt by AIDS Fear*, WASH. POST, Aug. 10, 1983, at A9 (congressional testimony of Assistant Secretary of Health, Dr. Edward N. Brandt, Jr.).

20. *Id.* See also Wilke, *supra* note 13, at A2.

21. Wilke, *supra* note 13 (statement of Dr. Jean-Claude Campas, Vice-President of the Haitian Medical Association Abroad and Head of the Haitian Coalition on AIDS, before the House Govt. Operations Subcomm. on Intergovernmental Rel. and Human Resources).

22. Wilke, *supra* note 19, at A9.

23. Lee Hockstader, *AIDS in Haiti: An Impoverished Island Nation Confronts What the U.S. Fears For Its Future*, WASH. POST, Sept. 29, 1987, (Health Section) at 12, 13.

24. Wilke, *supra* note 19, at A9.

25. Philip J. Hiltz, *Haitian Doctors Uncover Clue to Mystery of Deadly AIDS*, WASH. POST, Oct. 23, 1983, at A12.

infected Haitians seemed to explain the higher rate of occurrence in Haitians of a virus spread primarily through "sexual contact, contaminated needles and blood transfusions, [and] not by casual contact."²⁶

An analysis of patterns of behavior in Haiti provides additional insight into how and why AIDS spread at a disproportionate rate among the Haitian population²⁷ and lends support to the conclusion that broad-based classification of Haitians as a high-risk group is inappropriate. Dr. Jean William Pape, Haiti's leading AIDS researcher and founder of the only AIDS clinic in Haiti, believes that "some of Haiti's most deeply ingrained social patterns—patterns of sexuality, poverty and health care—may be largely to blame for the surprise attack that AIDS has made on Haitian heterosexuals."²⁸

Pape and other Haitian researchers cite "economic homosexuality" as a factor in the spread of the disease to the heterosexual population in Haiti.²⁹ According to Dr. Bernard Liautaud, who diagnosed Haiti's first AIDS-related case in 1979, economic necessity has led a significant number of Haitian men to engage in homosexual prostitution.³⁰ Liautaud believes that these men contracted AIDS from their clients, largely foreign tourists, and then spread the virus to their female sexual partners.³¹

This spread of the disease through heterosexual contact is further exacerbated through what has been characterized as "a pattern of promiscuity that is common among Haitian men."³² Multiple common-law wives and extra-marital affairs are not unusual.³³ In addition, relations with female prostitutes, fifty to eighty percent of whom are believed to be infected with the AIDS virus, are common.³⁴ According to Pape, one of his patients reported having twenty sexual partners in a four year period. "This is a little more than most, but not much."³⁵

Economic necessity fosters another practice which has been viewed as a factor in the transmission of AIDS throughout the general population in Haiti. Due to very limited access to health care providers in

26. *Id.*

27. Hockstader, *supra* note 23, at 13. While the overall rate of AIDS in Haiti is comparable to the rate in the United States, the spread of the disease in Haiti beyond the identified high-risk groups—homosexual or bisexual men, recipients of blood transfusions, intravenous drug users—and among heterosexual women in particular, is markedly greater than that in the United States. *Id.* at 12.

28. *Id.* at 12-13.

29. *Id.* at 13.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 14.

34. *Id.*

35. *Id.* A deeply-rooted Catholic tradition in Haiti is also believed to contribute to the widespread failure of Haitian men to use condoms. *Id.*

impoverished communities,³⁶ particularly in rural areas, untrained and uncertified practitioners, known as *piqurists*, are widespread and popular.³⁷ *Piqurists* dispense penicillin, vitamins and other drugs via intramuscular injection, sometimes reusing unsterilized needles.³⁸ Five to six percent of the AIDS cases in Haiti are believed to have been transmitted through such injections.³⁹

Furthermore, an inadequate national health care program and a complete lack of resources for AIDS research, treatment and education have contributed to the continued spread of the virus in Haiti.⁴⁰ Economic and political instability have made establishment of national standards for treatment and education problematic.⁴¹ Haiti's largely illiterate, rural and impoverished population is difficult to reach and educate.⁴² Moreover, widespread poverty exacerbates other public health issues—infant mortality, contamination of the water supply, malnutrition—which pose greater risks to the population than does AIDS.⁴³ “[I]n a country where 35 percent of the babies die before their first birthday, to come talk to me about the ravages of [AIDS] to me seems a little bit ridiculous. If you live long enough to get [AIDS] in Haiti, you're lucky.”⁴⁴

The economic and cultural realities that have facilitated the spread of AIDS in Haiti were nonetheless recognized as insufficient grounds for a continued designation of all Haitians as individuals with a high-risk of contracting or transmitting the disease. The CDC's determination in 1985 that only those Haitians engaging in recognized high-risk behaviors are likely to contract or transmit the AIDS virus⁴⁵ reflected both a better understanding of the nature of transmission of the virus and the discovery of the earliest reported AIDS cases outside of Ha-

36. Lee Hockstader, *AIDS Taking Big Toll on Tiny Haitians*, WASH. POST, Sept. 22, 1990, at A17, A26. According to Reginald Boulos, a Haitian AIDS expert and researcher, only 2 in 5 Haitians have access to adequate health care. *Id.*

37. Hockstader, *supra* note 23, at 14.

38. *Id.*

39. *Id.*

40. Lee Hockstader, *For an AIDS 'Cure,' Folk Doctor Charges \$1 a Shot*, WASH. POST, Sept. 29, 1987, (Health Section) at 16.

41. *Id.* Typically, during periods of political upheaval or unrest, Haitians have abandoned the urban centers and fled to rural areas. This has contributed to the spread of AIDS to the outlying areas, where inadequate education and health care programs make further transmission likely. Hockstader, *supra* note 36, at A26.

42. Hockstader, *supra* note 40, at 17.

43. *Id.* at 16. For example, despite the risk of transmission of the AIDS virus from mother to infant, doctors in Haiti advise mothers with the virus to breast-feed their babies. The risks of not breast-feeding posed by impure water supplies and misuse or unavailability of infant formulas far outweigh the chances of transmitting the virus through breast-milk. Hockstader, *supra* note 36, at A26.

44. Hockstader, *supra* note 40, at 16 (statement of Rev. Hugo Trieste, Director of Radio Soleil, a popular Catholic radio station).

45. Christine Russell, *Haitians No Longer Listed As Known AIDS Risks*, WASH. POST, April 9, 1985, at A3.

iti.⁴⁶ Therefore, it became clear that the same types of behavior put both the general population and Haitians at risk. Moreover, it was established that Haiti was no more likely to be the birthplace of AIDS⁴⁷ than the United States.⁴⁸ Both these realizations made the continued designation of Haitian nationality as a risk factor illogical.

III. CAN EXCLUSION CONTAIN THE SPREAD AND COST OF AIDS IN THE UNITED STATES?

A. *The Origins of the HIV-Exclusion Policy*

The first attempt by the federal government to exclude aliens infected with HIV occurred in 1986, when the Department of Health and Human Services (HHS) drafted regulations that required aliens applying for permanent resident status to undergo testing for the AIDS virus.⁴⁹ The nature of the restrictions to be placed on an alien testing positive for the virus were debated at length,⁵⁰ and culminated in the Senate's unanimous approval in June 1987 of an initiative sponsored by Sen. Jesse Helms to add the AIDS virus to a list of seven contagious diseases for which an alien could be denied entry to the United States.⁵¹ This Senate action was extraordinary in that it assumed a responsibility, previously entrusted exclusively to the HHS, to determine which communicable diseases would be grounds for excluding aliens.⁵² The decision to act in this area may well have resulted from the belief that the rapid spread of this "new" disease in the United States, coupled with fear and ignorance of the public about how it was spread, called for drastic measures.⁵³

Nevertheless, subsequent research and increased understanding

46. *Id.* See also Victor Cohn, *Africa May Be the Origin of AIDS Disease*, WASH. POST, Nov. 27, 1983, at A4. The first two cases were reported in 1976 in patients who had lived in Zaire. These cases were two years earlier than the first reported cases in both the United States and Haiti. *Id.*

47. The discovery of early AIDS cases in Zaire is equally insufficient proof that the virus originated in Africa. Based on the negative impact its reputation as a possible source of AIDS had on Haiti, health officials cautioned against a similar designation of Central Africa. Cohn, *supra* note 46, at A4.

48. Based on the fact that AIDS was discovered in Haiti at the same time it was discovered in the United States, it is possible that the virus could have been transmitted from one country to the other, although it is impossible to say in which direction the disease might have travelled. Hiltz, *supra* note 25, at A12. However, certain Haitian health officials believe that the virus originated with American and Canadian homosexuals vacationing in Haiti in the late 1970s. Hockstader, *supra* note 23, at 13.

49. Susan Rasky, *AIDS Test For Immigrants Sought*, N.Y. TIMES, Feb. 4, 1986, at A5.

50. Robert Pear, *U.S. to Pursue Proposal to Bar Aliens with AIDS*, N.Y. TIMES, March 27, 1987 at 14.

51. 42 C.F.R. § 34.2 (1987).

52. See *Visas and Virus*, *supra* note 7.

53. See generally *The Second 100,000 Cases of Acquired Immunodeficiency Syndrome—United States, June 1981 — December 1991*, *supra* note 12 (overview of the rate and spread of HIV and AIDS in the United States from 1981 to 1991).

about how the virus is transmitted led the CDC, in 1990, to recommend that HIV and all other sexually transmitted diseases be removed from the list of communicable diseases for which an alien could be excluded, leaving only infectious tuberculosis as a ground for exclusion.⁵⁴ This recommendation was supported by many who criticized the exclusion policy as "intrusive, humiliating, and ineffective."⁵⁵ In particular, the policy was criticized because it was not consistent with current knowledge about the ways in which AIDS could be transmitted, and was contrary to the findings and recommendations of federal health authorities. "If the doctors and scientists in the Public Health Service declare that AIDS is not a communicable disease like tuberculosis, and that it is not as dangerous because it cannot be spread without engaging in specific behavior, their informed opinion on the best health policy should prevail."⁵⁶

B. Congress' Attempt to Reverse the Exclusion Policy: IMMACT and the Realigned Bill

The move to return authority over excludable medical condition determinations to the HHS was led by Rep. J. Roy Rowland, a physician and member of the National Commission on AIDS.⁵⁷ Rep. Rowland drafted a bill which would allow HHS to remove HIV from the list of excludable diseases as part of a broadly sweeping immigration reform package presented to Congress in October 1990.⁵⁸ Without this legislation, Dr. Louis Sullivan, HHS Secretary, would be unable to remove HIV from the list despite his belief that there was no public health reason to exclude aliens with the virus from the United States.⁵⁹

Support for the Rowland bill was strong among public health officials and AIDS advocacy groups. Dr. David Rogers, Co-Chair of the National Commission on AIDS, expressed relief over the possible end of a policy which had attracted much international criticism and which had "embarrassed our country."⁶⁰ Daniel Bross, Director of the AIDS Action Council, supported the return of authority to HHS, a move which would bring to an end the Administration's waiver policy for certain aliens who declared that they were infected with HIV, which

54. *Visas and Virus*, *supra* note 7, at A18.

55. *Id.*

56. *Id.*

57. *Id.*

58. Philip J. Hilts, *Landmark Accord Promises to Ease Immigration Curbs*, N.Y. TIMES, Oct. 25, 1990, at A1. This legislation, the Immigration and Nationality Act of 1990 [hereinafter 1990 Immigration Act], was designed to "reduce the scope and severity of restrictions on new citizens and other immigrants, eliminating some barriers that dated from the anti-Communist crusades of the 1950s." *Id.* It also increased overall admission levels by 35-40 percent. Dick Kirschten, *Mix-Up at the INS*, 23 NAT'L J. 21, 21 (1991).

59. *Id.*

60. Hilts, *supra* note 57, at A1.

advocacy groups considered stigmatizing.⁶¹

Opposition to the bill was led by Sen. Jesse Helms, who considered the proposal an attempt to appease the AIDS lobby and "the homosexual rights movement which fuels it."⁶² Sen. Helms claimed that HHS was not acting in the interest of the public health but was "promoting an agenda skewed to placate the appetite of a radical and repugnant political movement."⁶³ "Once again," Helms said, "the politics of AIDS is given priority over common sense and the public good."⁶⁴ He called for a reaffirmation of the 1987 Helms amendment, relying for support on a 1989 resolution by the American Medical Association which stated that "[t]o exclude HIV infection from the health assessment of those seeking United States citizenship would be a change in longstanding United States policy and difficult to justify on medical, scientific, or economic grounds."⁶⁵ In addition, Sen. Helms credited mandatory testing imposed by the Helms amendment with detecting and excluding a strain of HIV which is rare in the United States but prevalent in other countries, and argued that continued exclusion was a necessary step to contain the spread of AIDS in the United States.⁶⁶

Pursuant to the mandate of the 1990 Immigration Act, Dr. Sullivan, in January 1991, issued a Notice of Proposed Rulemaking that called for the establishment by HHS of a list of "communicable diseases of public health significance" for the medical examination of aliens.⁶⁷ This proposal, "[b]ased on current epidemiological concepts and medical diagnostic standards," suggested that "infectious tuberculosis" be the only disease considered a communicable disease of public health significance.⁶⁸ If accepted, this proposal would replace the previous list of "dangerous contagious diseases," as excludable medical conditions. That list included five sexually transmitted diseases, HIV infection, active tuberculosis and infectious leprosy.⁶⁹ Sullivan's proposal stated that only infectious tuberculosis presented a public health risk to the United States. Among the reasons for removal of sexually transmitted diseases and HIV, Sullivan cited the inability to transmit these diseases through "casual contact, through the air, or from common vehicles (such as

61. *Id.* Waivers could be granted for temporary admission of certain aliens willing to declare themselves infected and to carry documents indicating the waiver in their passports. *Id.*

62. 137 CONG. REC. S878, S881 (daily ed. Jan. 14, 1991)(statement of Sen. Helms).

63. *Id.* at S882.

64. *Id.*

65. *Id.* The AMA resolution did in fact recommend continued testing of all aliens seeking permanent residence, and counseling of those who tested positive for the virus. It did not, however, recommend exclusion of aliens testing positive for HIV. 56 Fed. Reg. 2,484 (1991)(to be codified at 42 C.F.R. pt.34)(proposed Jan. 23, 1991).

66. 137 CONG. REC. S878, S882.

67. Medical Examination of Aliens, 56 Fed. Reg. 2484 (1991)(to be codified at 42 C.F.R. pt.34)(proposed Jan. 23, 1991).

68. *Id.*

69. *Id.*

food or water).⁷⁰ Specifically referring to HIV, he said:

The risk of (or protection from) HIV infection comes not from the nationality of the infected person, but from the specific behaviors that are practiced. Again, a careful consideration of the epidemiological principles and current medical knowledge leads us to believe that allowing HIV infected aliens into this country will not impose a significant additional risk of HIV infection to the United States population, where prevalence of HIV infection is already widespread. Our best defense against further spread of HIV infection, whether from a U.S. citizen or alien, is an educated public.⁷¹

Addressing the financial burden that this proposal might place on the United States economy, Dr. Sullivan further indicated that this rule would not:

- (1) Have an annual effect on the economy of \$100 million or more;
- (2) Impose a major increase in costs or prices for consumers; individual industries; Federal, State or local government agencies; or geographic regions; or
- (3) Result in significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.⁷²

C. *The Exclusion Policy Survives*

During a thirty day public comment period following the issuance of Dr. Sullivan's proposal, the HHS received 40,000 letters in opposition to the elimination of HIV infection as a ground for exclusion of aliens.⁷³ These letters contended, for the most part, that admission of HIV-infected aliens would "expose this country to public health risks and huge potential medical costs."⁷⁴ As a result, the HHS, under pressure from the Bush Administration, determined that more time was needed to review the issue, and in the interim issued regulations under which the eight diseases previously listed as "dangerous contagious diseases" would constitute "communicable diseases of public health signif-

70. *Id.*

71. *Id.*

72. *Id.* Having satisfied these criteria, no regulatory impact analysis of the interim rule would be required. *Id.*

73. Karen DeWitt, *U.S., In Switch, Plans to Keep Out People Infected With AIDS Virus*, N.Y. TIMES, May 26, 1991, at A1.

74. Robert Pear, *Health Department Loses in AIDS Rule Dispute*, N.Y. TIMES, May 28, 1991, at A18.

inance" under the provisions of the 1990 Immigration Act.⁷⁵ These interim regulations remain in effect today.

Opponents of the proposed regulation in Congress⁷⁶ and the Justice Department cheered the Administration's decision to shelve the proposal and questioned Dr. Sullivan's conclusion that AIDS was not a "communicable disease of public health significance."⁷⁷ Nevertheless, supporters of the exclusion policy change decried the move as politically motivated⁷⁸ and not based on sound public health considerations.⁷⁹

Despite statements by Administration and Justice Department officials that a compromise policy could be structured that would exclude only those aliens infected with the virus seeking permanent resident status,⁸⁰ thereby addressing concerns about potentially great financial burdens posed by long term care and treatment of alien AIDS patients, proponents of the HHS proposal found that "singling out AIDS for exclusion," while other illnesses that could be equally costly to treat were not excluded, perpetuated "ignorance and bigotry."⁸¹ Particularly in light of the fact that a long standing immigration policy exists which calls for exclusion of any alien likely to become dependant on public support, for health or other reasons,⁸² opponents of the HIV exclusion policy felt that the Administration's actions were motivated by politics and prejudice rather than sound economic or public health considerations.⁸³

The exclusion policy has also been criticized because it perpetuates a false notion that HIV comes from other countries—from foreign-

75. Medical Examination of Aliens, 56 Fed. Reg. 25000 (1991)(to be codified at 42 C.F.R. pt. 34)(proposed May 31, 1991).

76. DeWitt, *supra* note 73, at A1. Republican Congressman William Dannemeyer called the HHS proposal "ludicrous," commenting that "on the one hand they say AIDS is a major problem; on the other hand they say that we should take in HIV carriers with impunity." *Id.*

77. Pear, *supra* note 74, at A18.

78. DeWitt, *supra* note 73, at A1. "This is a perfect example of political cowardice," said Rep. Barney Frank. "This is just some raw meat that George Bush can throw to Republican primitives so he can get on with what he's really interested in: foreign policy." *Id.*

79. Pear, *supra* note 74, at A18. Dr. Jonathan Mann, Director of the World Health Organization's Global Programme on AIDS from 1986 to 1990, said that "[a] restriction on travel of people infected with the AIDS virus is inappropriate, unnecessary and unhelpful and would represent a clear victory for fear, misinformation and simplistic thinking over public health realities." *Id.*

80. *Id.*

81. 137 CONG. REC. E2213, E2213 (daily ed. June 13, 1991)(statement of Rep. Frank).

82. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988).

83. 137 CONG. REC. E2914, E2914 (daily ed. Aug. 2, 1991)(statement of Rep. Studds)(quoting Harvey V. Fineberg, *False Aim Against AIDS*, N.Y. TIMES, July 31, 1991).

The real reasons behind the exclusionary policy are unstated — irrational fear, misunderstanding, and prejudice, salted by political opportunism and cowardice. Foreigners are an easy target, especially those with a dread disease associated with a lifestyle that some despise. Excluding those with HIV infection is a surrogate for keeping out social undesirables.

ers⁸⁴—and that by excluding those foreigners the United States could protect itself from the spread of AIDS. Such a policy not only endangers the public health by creating misinformation about the risks and means of transmission of the virus in the United States, but also encourages prejudice and discrimination against people living with HIV, aliens and United States citizens alike.⁸⁵ Given the high rates of infection in countries with black and hispanic populations, and the overall prevalence of HIV among homosexuals, it seems especially likely that a policy of exclusion for HIV could be enforced in a way which arbitrarily discriminates against aliens on the basis of race or sexual orientation.⁸⁶

The HIV exclusion policy defies not only the recommendation of United States health authorities, but also disregards the opinions of international health organizations regarding this “global” crisis.⁸⁷ The World Health Organization has labeled AIDS a pandemic and has called for a global response to the virus which includes among its priorities: “opposing discrimination and stigmatization as irrational and unethical responses to HIV-infected persons, which endanger public health” and “fighting complacency and denial so that countries everywhere face and fight the AIDS pandemic in a spirit of realism and solidarity.”⁸⁸ Rather than be guided by these priorities, the Administration has acted in an irrational attempt to rid the United States of the AIDS virus by insulating itself from foreign carriers of the disease. This policy has no doubt cost the United States the respect of those in the international health community struggling against this global catastrophe. More importantly, though, until the United States reconsiders its decision to exclude aliens infected with HIV and, instead, cooperates in the international effort to contain the spread of the virus worldwide, many lives and valuable resources will be wasted in this isolated and vain endeavor.

84. 137 CONG. REC. S9029, S9029 (daily ed. June 27, 1991)(statement of Sen. Cranston)(quoting from *The AIDS Ban Invites Ridicule*, N.Y. TIMES, June 19, 1991). “What a travesty that the United States, with one of the largest AIDS-infected populations in the world, has taken a stance that implies the danger comes from abroad.” *Id.*

85. 137 CONG. REC. E2213, E2213 (June 13, 1991)(statement of Rep. Frank)(quoting Dr. Max Essex, *Sound Health Policy, Not Hysteria on AIDS*, N.Y. TIMES, June 8, 1990). “These restrictions also send another damaging message to the American public and to the world — the message that it is acceptable to discriminate against people with HIV. This is simply bad public policy, which encourages the prejudice and ignorance that have consistently impeded attempts to eradicate AIDS.” *Id.*

86. *Id.*

87. World Health Organization, *The Global HIV/AIDS Situation*, IN POINT OF FACT, May 1991.

88. *Id.* at 1.

IV. SHOULD HIV-INFECTED REFUGEES BE DENIED SAFE HAVEN?

The debate surrounding the Administration's policy of exclusion has to a great extent centered around the admission of HIV-infected aliens seeking to enter the United States as temporary visitors or permanent residents. Nevertheless, this policy has distinct and important implications for political refugees, aliens whose circumstances provide them with few, if any, alternatives if denied entry to the United States. Whether and how the exclusion policy should be applied to HIV-infected refugees is an issue which has been presented recently in the case of 222 HIV-positive Haitians who are applying for political asylum in the United States. The controversy surrounding these Haitians has been fueled by the broader discussion of admission of HIV-infected aliens generally, but it has also centered on questions relating to enduring perceptions of Haitians as high-risks for HIV transmission and largely economic migrants, rather than political refugees. These perceptions have further complicated an exclusion policy debate focused primarily on the public health and economic perils of admitting HIV-infected aliens.

A discussion of current United States refugee policy will reveal that the exclusion of HIV-infected refugees is contrary to the humanitarian purpose of the Refugee Act. In the case of these Haitians, not only should established refugee policy prevent them from being excluded, but the economic and public health arguments against their admission should also fail in view of the negligible actual threat they pose to those interests. Particularly, in light of the preceding discussion of the Haiti-AIDS myth and the HHS recommendations not to exclude HIV-infected aliens, the Administration's refusal to admit these Haitians will be revealed as essentially misguided, if not motivated purely by politics and prejudice. Rather than focusing on their status as refugees, United States policy decisions regarding the Haitians have focused instead on HIV status. In particular, in its refusal to provide them access to counsel, the Administration has used the Haitians' HIV infection as a basis for denying them rights and privileges that any other refugee would enjoy. Such actions clearly contravene the spirit of the refugee provisions of the INA and strongly suggest that other considerations motivate the Administration's policy decisions in this area.

A. *Critical Distinctions Between Refugees and Other Aliens*

The economic and public health arguments against admitting HIV-infected aliens generally are inappropriate in a discussion of HIV-infected political refugees for several reasons. First, in order to be granted political refugee status, an alien must demonstrate the existence of certain perilous circumstances which have forced her to leave

her home and seek asylum in the United States.⁸⁹ If an alien meets these criteria, her status as a refugee affords her certain protections under United States⁹⁰ and international law.⁹¹ United States immigration policy recognizes these special circumstances of a refugee by allowing for exemptions from and discretionary waivers of certain grounds for exclusion which would be applicable to other aliens.⁹² Among those exclusion provisions which are applied differently in the case of political refugees, are those relating to medical conditions⁹³ and to economic self-sufficiency.⁹⁴

For example, in the case of aliens seeking political asylum in the United States, the possibility that the alien might be or become dependant upon public support may not be a basis for exclusion.⁹⁵ This provision no doubt takes into consideration the political strife, war, poverty, and famine which frequently coincide with an alien's need to flee her home and seek refuge in another country. Under those circumstances, it would be unreasonable to require a refugee to have made financial or employment arrangements which might be expected of an alien coming to the United States as a permanent resident or temporary visitor. In fact, to deny a refugee entry in that case would be to ignore the very circumstances which have conferred that refugee status upon her in the first place.

Similar considerations were likely to have been important to Congress' determination that refugees with an otherwise excludable medical condition might still be admissible "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁹⁶ In light of the nature of their flight and their lack of viable alternatives under frequently life-threatening circumstances, to exclude refugees on health related grounds would contradict the protective intent of United States and international asylum law. Congress clearly intended to remove obstacles to the entrance of refugees,⁹⁷ giving priority over all to

89. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988). A refugee is

any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

Id.

90. See INA §§ 207-209, 8 U.S.C. §§ 1157-1159 (1988 & Supp. II 1990).

91. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

92. INA § 207(c)(3), 8 U.S.C. § 1157(c)(3) (1988 & Supp. II 1990).

93. INA § 212(a)(1), 8 U.S.C. § 1182(a)(1) (1988 & Supp. II 1990).

94. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988).

95. INA § 207(c)(3), 8 U.S.C. § 1157(c)(3) (1988 & Supp. II 1990).

96. *Id.*

97. In addition to health related grounds, in the case of refugees Congress provided for exemption from or a waiver of all other grounds, including certain criminal convictions, except those

their claims of persecution. Therefore, particularly where a medical condition has been determined to pose no risk to the public welfare of the United States,⁹⁸ as is the case with HIV, it would seem unconscionable to deny entry and, subsequently, access to health care, to an otherwise admissible political refugee.

A second reason that traditional economic and public health arguments should not apply to HIV-infected refugees is that, aside from the special circumstances surrounding their entrance, refugees can be distinguished from aliens coming to the United States as tourists or permanent residents by the much smaller numbers in which they can be admitted on an annual basis. Under current provisions of the INA, a maximum of 50,000 refugees may be admitted to the United States each year,⁹⁹ as compared with 675,000 permanent residents¹⁰⁰ and a virtually unlimited number of temporary visitors.¹⁰¹ Based on their relatively small numbers—and presumably a far smaller number would test positive for HIV—it seems reasonable to suggest that, all other things being equal, refugees do not pose the potential public health or economic burdens that might be posed by temporary visitors and permanent residents.

B. *The Case of the Guantánamo Haitians*

The 222 HIV-infected Haitians who are currently being detained at a United States Naval Air Station at Guantánamo Bay, Cuba are the unfortunate victims of a series of political and legal battles which began more than a year ago. Shortly after the military coup which ousted Haitian President Jean-Bertrand Aristide, thousands of Haitians began fleeing widespread violence and military oppression in boats bound for the United States and elsewhere. The tale of the United States' response to this flood of refugees is both complicated and controversial. Nevertheless, a brief review of this history will reveal a pattern of discrimination and injustice in the Administration's treatment of HIV-infected Haitian refugees.

1. *Overview of the U.S. Interdiction and Screening Programs*

In September 1981, the United States Coast Guard, pursuant to an

relating to participation in drug trafficking, threats to United States national security or foreign policy, terrorism, and genocide. *Id.*

98. Aside from "communicable diseases of a public health significance," aliens may be excluded for certain physical and mental disorders and drug abuse or addiction. INA § 212(a)(1)(A), 8 U.S.C. § 1182(a)(1)(A) (1988 & Supp. II 1990).

99. INA § 207(a)(1), 8 U.S.C. § 1157(a)(1) (1988).

100. INA § 201(a), 8 U.S.C. § 1151(a) (1988).

101. The annual admission of non-immigrant aliens has no numerical limitations and currently exceeds 16 million. THOMAS ALEXANDER ALEINIKOFF AND DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 219 (2d ed. 1991).

Executive Order of President Ronald Reagan¹⁰² and a cooperative agreement with the government of Haiti,¹⁰³ began interdicting Haitians at sea. As part of this program, Immigration and Naturalization Service (INS) officers aboard Coast Guard cutters interviewed interdicted Haitians to determine whether they had a "credible fear of persecution"¹⁰⁴ which would entitle them to be transported to the United States to apply for political asylum.¹⁰⁵ Those Haitians found to have a credible fear were "screened in" and brought to the United States.¹⁰⁶ Those found not to have a credible fear were "screened out" and returned to Haiti.¹⁰⁷ From 1981 until 1991, less than one percent of those Haitians intercepted at sea were "screened in."¹⁰⁸

Although the United States briefly suspended the interdiction program following the September 1991 coup, as of November 18, 1991, the United States Coast Guard resumed the interdiction and repatriation of Haitians.¹⁰⁹ Shortly thereafter, in response to a lawsuit filed by advocates for the Haitians, the screening process was temporarily halted and interdicted Haitians were moved off the Coast Guard cutters to the naval station at Guantánamo.¹¹⁰ That lawsuit challenged, among other things, the adequacy and fairness of the INS screening process.¹¹¹ Following a number of appeals from November to February, the Supreme Court, on February 4, 1992, moved to allow the resumption of the interdiction, screening and repatriation process.¹¹² The Supreme Court's action came in direct response to assurances by the Administration that all "screened in" Haitians would be brought to the United States to pursue their asylum claims.¹¹³ Nevertheless, a February 29, 1992 memorandum from INS General Counsel Grover Rees announced that all "screened in" Haitians who were determined to have an excludable communicable disease would have their second asy-

102. Executive Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C. § 1182 note (1988).

103. Agreement Between the United States of America and Haiti, U.S.-Haiti, Sept. 23, 1991, 33 U.S.T. 3359, T.I.A.S. No. 10,241.

104. This "credible fear" standard was designed by INS officials as a threshold standard used to make a preliminary determination about whether a Haitian could enter the United States to apply for asylum under the more stringent "well-founded fear" standard prescribed by the INA. Susan Beck, *Cast Away*, THE AMERICAN LAWYER, Oct. 1992, at 56.

105. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1329-30 (2d Cir. 1992).

106. *Id.* at 1330.

107. *Id.*

108. Beck, *supra* note 104, at 55. "Of the more than 20,000 Haitians intercepted at sea between 1981 and the end of 1990, six received asylum." *Id.* at 56.

109. Haitian Ctrs. Council, 969 F.2d at 1330.

110. Beck, *supra* note 104, at 56.

111. *Id.* Conditions at Guantánamo, while an improvement over those on the cutters, were considered inadequate by many asylum officers, who each day conducted 10-15 interviews that lasted from 20-40 minutes each. *Id.* at 57.

112. See Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir.) (per curiam), *cert. denied*, 112 S. Ct. 1245 (1992).

113. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1335 (2d Cir. 1992).

lum interviews at Guantánamo, not in the United States.¹¹⁴ Rees' memo instructed asylum officers at Guantánamo to conduct proceedings identical to those which an asylum applicant in the United States would be given.¹¹⁵ However, unlike applicants in the United States who have the right to the assistance of counsel during an asylum proceeding, the HIV-infected Haitians would not be permitted access to attorneys.¹¹⁶

In response to this new policy, legal services providers in the United States seeking access to the Haitians successfully sought a court order restraining the INS from interviewing or returning any HIV-infected Haitians before they were able to receive the assistance of counsel.¹¹⁷ They contended that the treatment of these Haitians was unfair because, if their asylum proceedings been conducted in the United States, as had been the procedure between 1981 and late 1991, these screened-in Haitians would have been entitled to the assistance of counsel and had a right to appeal an unfavorable ruling in an asylum hearing.¹¹⁸

Nevertheless, despite a district court order prohibiting further processing or repatriation, the INS continued to refuse the Haitians access to counsel, arguing that the right to counsel did not exist outside of United States territory.¹¹⁹ When, on April 22, the Supreme Court stayed the district court's order pending appeal,¹²⁰ the INS took advantage of the opportunity and ordered asylum officers at Guantánamo to make the second interviews of the HIV-infected Haitians a priority.¹²¹ Between April 22 and June 10, asylum officers were processing these applicants at a rate of one every two hours.¹²² Remarkably, fifty percent of these Haitians were granted asylum.¹²³ However, the other fifty percent and eighty-nine others who refused to undergo second interviews, some because they did not have counsel, were returned to Haiti¹²⁴ before the June 10 Court of Appeals ruling prohibiting further processing or repatriation without counsel.¹²⁵

114. *Id.* at 1332-33.

115. *Id.* at 1333.

116. *Id.* Regulations established pursuant to the INA provide an asylum applicant the right to the assistance of counsel, but do not require the United States to provide counsel to the alien during an asylum proceeding. 8 C.F.R. § 208.9(b) (1991).

117. *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992). The same court subsequently issued a preliminary injunction which sustained the relief granted by the earlier order, pending appeal. *Haitian Ctrs. Council, Inc. v. McNary*, No. 92 cv 1258, 1992 WL 155853 (E.D.N.Y. April 6, 1992).

118. *Haitian Ctrs. Council*, 969 F.2d at 1333.

119. *Id.* at 1341.

120. *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct 1714 (1992).

121. Beck, *supra* note 104, at 58.

122. *Id.*

123. *Id.* Although granted asylum, these Haitians were not permitted to enter the United States. *Id.*

124. *Id.*

125. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326 (2d Cir. N.Y. 1992).

Since June, the INS has continued to refuse the Haitians access to counsel¹²⁶ and has petitioned the Supreme Court to hear the case and allow asylum processing to continue. This denial of access comes despite the testimony of asylum officers that "the presence of attorneys during the second interviews could be useful, would be feasible, and would not interfere with the interviewing process."¹²⁷ Nevertheless, these HIV-infected Haitians, along with some family members who chose to remain with them, continue to wait—the last of more than 37,000 Haitians who passed through Guantánamo between November 1991 and June 1992.¹²⁸ An Executive Order issued by President Bush on May 24, 1992 calling for the return without processing of all Haitians interdicted at sea,¹²⁹ finally succeeded in stemming the flow of refugees onto the high seas.

2. *An Inconsistent and Discriminatory Policy*

The Administration's refusal to allow these Haitians access to counsel, despite the fact that it would be provided at no expense or inconvenience to the government; despite the fact that absent their HIV-status they would have been admitted to the United States, where such access would have been provided; and despite claims that aliens are twice as likely to be granted asylum in a proceeding where they are represented by counsel,¹³⁰ reveals its unyielding determination to exclude HIV-infected aliens. Nevertheless, inconsistencies in the testing and admission of HIV-infected refugees have led to accusations of racism and political maneuvering in the Administration's policy decisions in this area.¹³¹ "During this election year Bush is not going to allow a poor black HIV-positive Haitian to come into the United States," said Michael Ratner of the Center for Constitutional Rights, one of the legal services organizations seeking access to the Haitians.¹³²

Haitian advocates charge the administration with using HIV-infection as an excuse for discrimination against Haitians, arguing that po-

126. Michael Ratner of the Center for Constitutional Rights, one of the advocacy groups seeking access to the Haitians, characterized the government's response to the court order as follows: "Okay, you guys. If we need to process these guys with an attorney, we're just not gonna process them. We'll leave them on Guantanamo." Lynne Duke, *Haitian Refugees Remain in Limbo As Asylum Claims Stall*, WASH. POST, Aug. 7, 1992, at A3.

127. Haitian Ctrs. Council, Inc., 969 F.2d at 1342.

128. Gary Lee and Molly Sinclair, *Refugee Policy Protested*, WASH. POST, Sept. 10, 1992, at A9. More than 27,000 of those were determined not to have a credible fear of persecution and were returned to Haiti. 10,736 were admitted to the United States for further asylum processing. *Id.*

129. Executive Order No. 12,807, 57 Fed.Reg. 23,133 (1992).

130. Haitian Ctrs. Council, Inc., 789 F. Supp. at 557.

131. Merle English, *Rally Hits Haitian HIV "Prison Camp"*, NEWSDAY, Sept. 23, 1992, at 28.

132. *Id.*

litical refugees from other countries are not routinely tested for HIV.¹³³ "Once more the stigma of Haitians as carriers of AIDS is being vented here when AIDS is a worldwide epidemic," said Sabine Albert of the Haitian Resistance Movement.¹³⁴ "We have no knowledge of Eastern Europeans being held. There are Russians coming in. This screening has been specific to the Haitian refugees."¹³⁵

Johnny McCalla, Director of the National Coalition for Haitian Refugees, believes that the decision to screen Haitians for HIV and exclude those who tested positive was part of the Administration's response to an INS screening process which had allowed thousands of Haitians to enter the United States to pursue asylum claims.¹³⁶ According to McCalla, too many Haitians were being screened in "so the Justice Department changed the rules."¹³⁷ "They set up another hurdle and that was to use the medical exclusion rule," he said.¹³⁸ INS officials have denied a policy change specifically for Haitians and contend that all refugees are given medical screenings.¹³⁹ Only those Haitians who were screened in aboard the Coast Guard cutters, before the facilities at Guantánamo were available, were admitted without HIV-screening, according to officials.¹⁴⁰ However, as late as February, some Haitians were still being screened in aboard Coast Guard cutters and brought to the United States, where subsequent HIV testing revealed that at least 220 were infected with the virus.¹⁴¹ Thus, the Administration's refusal to waive the exclusion policy for the 222 Haitians currently at Guantánamo seems inconsistent, if not hypocritical, in view of the earlier admission of untested HIV-infected refugees.

Reports of pressure from the Bush Administration to lower the screen-in rate for all Haitians have come from asylum officers and other INS officials at Guantánamo.¹⁴² This pressure is no doubt motivated by President Bush's long standing contention that the Haitians are fleeing poverty rather than political persecution.¹⁴³ Moreover, some critics charge that the former Administration supported the coup¹⁴⁴

133. Lee and Sinclair, *supra* note 128, at A9.

134. English, *supra* note 131, at 28.

135. *Id.*

136. Jim Loney, *Haitian AIDS Boat People Still in Limbo Year After Coup*, REUTERS, Sept. 30, 1992. By the time Rees' Feb. 29 memo was issued, the screen-in rate had fallen from its earlier peak at 85% to about 40%, but even that rate, which far exceeded the pre-coup rate of less than 1%, was reportedly considered too high by Justice Department officials. Beck, *supra* note 104, at 57.

137. Loney, *supra* note 136.

138. *Id.*

139. *Id.*

140. *Id.*

141. 138 CONG. REC. S1970 (daily ed. Feb. 21, 1992)(statement of Sen. Graham).

142. Beck, *supra* note 104, at 58.

143. Lee and Sinclair, *supra* note 128, at A9.

144. Lee Hockstader, *Haitians Look for U.S. Hand in Whatever Befalls Their Nation*, WASH. POST, June 17, 1992, at A33.

and is willing to risk a policy failure regarding a strategically insignificant nation without a powerful United States constituency.¹⁴⁵ It might also be argued that by specifically targeting the HIV-infected Haitians, the Administration was attempting, in an election year, to assuage the concerns of those voters who would exclude the Haitians because of perceptions that they are economic migrants, as well as those who would exclude them because of the public health or economic burden their HIV-status is believed to pose. Nevertheless, whatever the considerations which might have inspired the Administration to exclude these Haitians, it seems clear that their claims of persecution were not among them.

V. CONCLUSION

Advocates of the HIV-infected Haitians remain hopeful that the Clinton Administration will bring a change in the exclusion policy, but meanwhile one in ten of those at Guantánamo has developed symptoms of AIDS.¹⁴⁶ Since September, a number of Haitians with the virus have been admitted to the United States to receive medical treatment unavailable at Guantánamo.¹⁴⁷ One of those was a three month-old infant with severe pneumonia who died later at Walter Reed Army Medical Center in Washington, D.C.¹⁴⁸ Despite warnings of INS spokesman Duke Austin against "reading into" these admissions, which he called "humanitarian paroles for medical conditions," any change of policy by the Administration, Austin and others at INS have suggested that other Haitians will be brought to the United States when medically required.¹⁴⁹ Therefore, rather than grant discretionary waivers now and allow all the HIV-infected Haitians to enter the United States to apply for asylum, the Administration seems, at least for the present, to have chosen to deny entry until a Haitian's health has deteriorated to such an extent that the facilities at Guantánamo are no longer adequate to treat her. As a result, the Haitians, some of whom have been at Guantánamo for more than a year, grow desperate realizing that severe illness or death may be their only escape from the island.¹⁵⁰

145. 138 CONG. REC. S1970 (daily ed. Feb. 21, 1992) (statement of Sen. Graham).

146. Duke, *supra* note 126, at A3. The Haitians are being cared for by 27 Defense Department medical personnel at an 11-bed navy hospital and are receiving medication to prevent tuberculosis and other infections, as well as AIDS fighting medication such as AZT. *Id.*

147. Lynne Duke, *Four Haitians With HIV Admitted to U.S.; Entry of Refugees for Medical Care Said to be No Change in Policy*, WASH. POST, Sept. 4, 1992, at A8. See also Lynne Duke, *At Guantanamo Camp, Voices of Misery*, WASH. POST, Dec. 11, 1992, at A1.

148. Lynne Duke, *U.S. Camp for Haitians Described as Prison-Like*, WASH. POST, Sept. 19, 1992, at A1.

149. Duke, *supra* note 147, at A8. Plans to bring approximately twenty pregnant HIV-infected women to the United States to deliver their babies are reportedly under way. Duke, *supra* note 148, at A1.

150. Duke, *At Guantanamo Camp, Voices of Misery*, *supra* note 147 at A24. According to

These Haitians have been virtually imprisoned at Guantánamo, not because of any crime they have committed, but because they are victims of a deadly virus and of the fear and prejudice which enshroud it. Through their exclusion and confinement, the Administration continues a vain attempt to protect the public health and economy of the United States. Instead, it sends the false and dangerous message that the AIDS virus can be locked out of this country by locking out those who carry it.

The United States has used this exclusion policy to deny entry to 222 HIV-infected Haitians whose circumstances have left them without alternatives. To ignore their right to seek asylum because they are infected with HIV is to say that their infection has somehow condemned them to persecution. Such a policy not only contravenes the clear purposes of the Refugee Act of 1980,¹⁵¹ but displays a blatant cynicism about Haitian asylum claims in general. These Haitians became political pawns during an election year when the United States economy and health care system were central issues. In its decision to exclude them, the Bush Administration, preying upon fears and ignorance about the transmission of HIV, made false promises to the American people which placed the public health at greater risk. If President Clinton fails to reverse this policy, he will deny these Haitians their right to seek protection from dangers which are far more real and deadly than any they could pose to the United States.

refugee advocates, two Haitians being held at Guantanamo attempted suicide in November 1992. *Id.*

151. Duke Austin admitted that, although the Haitians are medically excludable, "the government's first standard in determining their fate is whether the immigrants would face persecution if they were returned home." Duke, *supra* note 126, at A3.

